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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 635

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL,
Appellants

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT

NATIONAL BUS TRAFFIC
ASSOCIATION, INC.
GREYHOUND LINES, INC.
TRANSCONTINENTAL BUS
SYSTEM, INC.
DELUXE TRAILWAYS, INC.

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JURISDICTIONAL STATEMENT

National Bus Traffic Association, Inc; Greyhound Lines, Inc.; Transcontinental Bus System, Inc.; and DeLuxe Trailways, Inc.; appellants herein, appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered on June 3, 1965, dismissing their complaint to set aside the report and order of the Interstate Com-

merce Commission, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

No opinion on the merits was filed by the District Court, but a copy of the unreported order of that Court, entered June 3, 1965, dismissing appellants' action is attached hereto as Appendix A. A copy of the report and order of the Interstate Commerce Commission in Docket No. MC-119262, *Ernest Keller, Jr., Common Carrier Application,* 94 M.C.C. 238 (1963), is attached as Appendix B. A copy of the report of Division 1 of the Commission in that proceeding, reported at 83 M.C.C. 339 (1960), is attached as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to suspend, enjoin, annul, and set aside the report and order of the Interstate Commerce Commission, dated December 11, 1963, served January 13, 1964. The judgment of the District Court for the Northern District of Illinois, Eastern Division, was entered on June 3, 1965, and notice of appeal was filed in that court on August 2, 1965. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. § 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *United States* v. *Drum,* 368 U.S. 370 (1962); *American Trucking Assns., Inc.* v. *United States,* 364 U.S. 1 (1960); *Frozen Food Express, Inc.* v. *United States,* 351 U.S. 40 (1956).

STATUTES INVOLVED

The relevant statutory provisions are the National Transportation Policy, 49 U.S.C., preceding §§ 1, 301, 901, and 1001, and Section 203(b)(1) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(1). They are set forth verbatim in Appendix D.

QUESTIONS PRESENTED

1. Whether or not the court erred in sustaining without explanation a decision of the Interstate Commerce Commission which enunciated a new interpretation of Section 203(b)(1) of the Interstate Commerce Act [49 U.S.C. 303(b)(1)] when the administrative decision was challenged for having no basis in law?

2. Whether or not the court erred in adopting the findings and conclusions of the Interstate Commerce Commission which convert the partial exemption from regulation for motor vehicles employed solely in transporting school children or teachers to or from school into an exemption for motor vehicles transporting school children and teachers on trips to places of historic or cultural interest which have no relation to ordinary, daily transportation to and from a school building?

3. Whether or not the court erred in approving without explanation the reversal by the Interstate Commerce Commission of prior administrative interpretation of the Act in the absence of any proper basis therefor?

4. Whether or not the court erred in approving the Interstate Commerce Commission's liberal interpretation of an exception from the terms of the remedial stat-

ute, which interpretation is so much at variance with the language and purpose of the statute as to constitute an amendment thereto?

STATEMENT OF THE CASE

By application filed November 20, 1959, as amended, Ernest Keller, Jr., of Waldorf, Maryland, sought from the Interstate Commerce Commission a certificate of public convenience and necessity authorizing operation in interstate and foreign commerce as a common carrier by motor vehicle over irregular routes of passengers and their baggage in charter service beginning and ending at points in Charles County, Maryland, east of U. S. Highway 301, and extending to points in the Washington, D. C., commercial zone. Division 1 of the Commission in a report dated July 29, 1960, 83 M.C.C. 339 (Appendix C), indicated that the proposed interstate charter operations would consist of the transportation of school children and teachers on school-sponsored trips to Washington, D. C., during the school year, arranged as part of the educational process, and paid for by the school, and thus are covered by the partial exemption in Section 203(b)(1).

On November 9, 1960, appellant National Bus Traffic Association, Inc., on behalf of and for the account of its members, filed with the Commission a petition seeking (a) leave to intervene in the proceeding before the Commission, (b) waiver of the Commission's rule requiring petitions for rehearing, reargument, or reconsideration to be filed within thirty days of the issuance of a report and order complained of, and (c) reopening of the proceeding and reconsideration of the report and order of Division 1. On March 3, 1961, the Commission, at a general session, entered an order denying

the request of appellant National Bus Traffic Association, Inc., for leave to intervene, and stating that such denial of intervention made it unnecessary to dispose of the said petition with respect to the other relief sought.

On or about June 1, 1961, appellants filed a complaint in the United States District Court for the Northern District of Illinois, Eastern Division in Civil Action No. 61-C-944 seeking to set aside and annul the report and order of Division 1 of the Commission and alleging that the Commission erred in refusing to permit appellant National Bus Traffic Association, Inc., to intervene and in refusing to reconsider the decision of Division 1, and further alleging that the decision of Division 1 was erroneous as a matter of law. On November 29, 1962, the District Court, in *National Bus Traffic Association* v. *United States,* 212 F. Supp. 659 (1962), handed down its opinion in which it concluded that the Commission abused its discretion in refusing to permit appellant National Bus Traffic Association, Inc., to intervene in the proceeding before the Commission and remanding the proceeding to the Commission with instructions to permit intervention of the plaintiffs, to waive its rule requiring petitions for reconsideration to be filed within thirty days, and to reopen and reconsider the report of Division 1 dated July 29, 1960. The judgment of the Court was entered on December 4, 1962. The Court expressed no opinion on the merits of the case.

On February 18, 1963, the Commission entered its order responsive to the District Court's judgment and pursuant to that order plaintiffs filed their petition for reconsideration on April 12, 1963. It was not opposed

or replied to by any party. On January 13, 1964, the Commission entered the report and order dated December 11, 1963 (Appendix B). That decision sustained the Division 1, decision in all material respects and is administratively final. In its decision, the Commission concluded that:

> ". . . . in our opinion, the transportation, in interstate or foreign commerce, of school children and their teachers in connection with school related activities on trips sponsored and supervised by school authorities, falls within the scope of the partial exemption of section 203(b)(1) of the act." (94 M.C.C. at 241)

On March 3, 1964 appellants filed their complaint in the United States District Court for the Northern District of Illinois, Eastern Division, in Civil Action 64-C-536, to set aside and annul the report and order of the Commission. On June 3, 1965, the Court entered its order (Appendix A) dismissing appellants' complaint on the merits.

THE QUESTIONS ARE SUBSTANTIAL

The issue presented by this appeal is whether an administrative agency may read into a statute language not placed there by Congress in order to exempt a type of transportation operation from economic regulation because the agency believes the operation should be exempt. Section 203(b)(1) exempts from all but safety regulation "motor vehicles employed solely in transporting school children and teachers to or from school . . .".

1. Admittedly, applicant would limit his transportation to school children and teachers. In construing

the second part of the partial exemption, Division 1 said:

> "We interpret 'to and from school,' as used in the exception, as embracing interstate transportation to or from any place where such transportation is directly connected with and contributes to the educational development of school children. Education development of school children. Education development in this context encompasses a broader area than mere classroom instruction in a school building. *The scope of the teaching process has widened since the passage of the legislation in question, and classroom instruction frequently is supplemented with field and sightseeing trips to points of historical and cultural interest, in order to provide the students with a firsthand knowledge of places, events, and techniques being studied in the classroom.*" (83 M.C.C. 340. Emphasis supplied.)

The entire Commission, in sustaining Division 1, said:

> "As the prior report noted, *schooling today encompasses an area broader than mere classroom instruction.* The teaching process is frequently supplemented, for example, with school-sponsored, educational trips to places of historical and cultural importance so that students may obtain firsthand knowledge and experience of what are properly subjects of classroom instruction . . . . In our opinion, the transportation, in interstate or foreign commerce, of school children and their teachers in connection with school related activities on trips sponsored and supervised by school authorities, falls within the scope of the partial exemption of section 203(b)(1) of the act." (94 M.C.C. 240-41. Emphasis supplied.)

The changed condition in education is the only rationale offered by the Commission for the new, far-

reaching construction it now attaches to the "school-bus exemption". In its decision it did not purport to follow prior, long-standing construction of the partial exemption. Indeed, it made clear that it was establishing a new construction, rather than following precedent, when, in discussing prior decisions in this area, it concluded:

> "However, to the extent, if any, that the Van Galder decision or any of the aforementioned cases may be construed as being inconsistent with the result reached here, they are overruled." (94 M.C.C. 243)

If present-day circumstances have so changed since the enactment of the statute as to warrant a re-evaluation of the scope of the "school-bus exemption"—a proposition for which neither the Commission nor the Division cite any evidence other than their own statements—the remedy properly lies with Congress rather than with the agency. The Commission has no more authority to modify a clear expression of Congressional policy than do the courts. In *American Trucking Assns., Inc.* v. *United States,* 364 U.S. 1 (1960), the argument was made that certain safeguards set out in the legislative policy were no longer needed because of changed transportation conditions. This Court declined the role of legislator:

> "This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress." (364 U.S. at 15)

The District Court in *Pennsylvania Truck Lines, Inc.* v. *United States,* 219 F. Supp. 871 (W.D. Pa.

1963), reviewing a decision of the Interstate Commerce Commission, rejected a similar argument, saying:

> "While there may be some merit to the plaintiffs' contention that changed conditions in the transportation industry since the enactment of the Interstate Commerce Act require a reassessment of the National Transportation Policy with respect to railroads, this Court should not become the vehicle for reshaping the laws which Congress has written. The plaintiffs' appeal in that regard must be to Congress itself." (219 F. Supp. at 875)

As to the Congressional policy at issue in the *American Trucking* and *Pennsylvania Truck Lines* cases, there was substantial legislative history to show its basis and reason. However, as the Commission acknowledges, here there is no indication of the legislative purpose. 94 M.C.C. 240. If the courts and the agencies must refrain from modifying the statute in the former instance where they have evidence of the legislative purpose, they must be doubly cautious in the latter, where no such indication of Congressional policy exists.

Thus, the Commission's discussion herein indicates that the narrower view of the partial exemption would curtail the operations of the school-bus operators and "create regulatory problems for the schools" (94 M.C.C. 241), suggesting that the legislative intent was to ease the regulatory burden for this class of operators and make it unnecessary for schools to use regulated passenger carriers for other than daily transportation of pupils between school and their homes. But it is at least equally as arguable, in the absence of a clear expression, that Congress's purpose was to free

the Commission of the burden of regulating a type of operation so insignificant as to have no material impact on the national transportation scene. At least the Commission found that transportation under the exemption, that is, in interstate commerce "does not occur frequently" when it initially considered the matter in *Motor Carrier Safety Regulations—Exemptions*, 10 M.C.C. 533 (1938), *infra*.

While an expansive construction of the exemption might accord with a Congressional purpose to aid school-bus operators, it would be contrary to an intention to free the Commission from dealing with relatively insignificant operations with minimal impact on the regulation of a national transportation system. If changed conditions in American education are to be found to warrant the free entry of economically unregulated school-bus operators into charter transportation throughout the United States in direct competition with the fully-regulated, duly-authorized passenger carriers, Congress must so declare, for such an amendment of the statute lies beyond the power of the Commission.

2. In support of its expansive construction of the partial exemption, the Commission suggests that the words of the statute are ambiguous:

> ". . . Moreover, the words of the exemption, although at first glance they may appear quite clear, are perhaps not quite so unequivocal as interveners would have us believe . . ." (94 M.C.C. 240)

It does this by assuming that "school" in the phrase "to or from school" does not refer to a school building, but may be an abstract term referring to "a body of students and teachers", "a period or session of

teaching", or "the process of formal education itself". (94 M.C.C. 240) The strain necessary to reach the alleged ambiguity is readily demonstrated by substituting each of the Commission's suggested alternatives for the word "school" in the language of the exemption. Indeed, had Congress intended such a broad exemption as the Commission now finds, the report below shows how easily and unmistakably it could have said so. The statute could have exempted

> Motor vehicles employed solely in the transportation of school children and their teachers in connection with school related activities on trips sponsored and supervised by school authorities.

It is a fundamental principle of law that the device of "construction" or "interpretation" may not be used to give a statutory provision a significance beyond its plain meaning. When the words of a statute are clear, there is no reason for construction or interpretation. As long ago as 1820, in *United States* v. *Wiltberger,* 5 Wheat, 76, 95-96, 5 L. Ed. 37, 42, Chief Justice Marshall said:

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words . . . ."

Justice Marshall's words were quoted with approval by this Court as recently as 1957 in *Yates* v. *United States,* 354 U.S. 298, 305.

Construction is a tool for ascertaining the legislative intent when that intent is not clear from the language of the statute. Here, however, the Commission has

used construction to create an ambiguity where none exists. And it has done so in order to modify a clear statutory provision because of its view that educational conditions have changed since the statute's enactment. But as the Court said in *Contract Steel Carriers* v. *United States*, 128 F. Supp. 25, 31 (N.D. Ind. 1955), *aff'd* 350 U.S. 409:

> "Dissatisfaction of an enforcement agency with the provisions of a statute does not open the legislative act to amendment by administrative decision under the guise of interpretation . . . ."

The Commission's error goes beyond construction of a statute clear and unambiguous on its face, because its construction does violence to the purpose and intent of the legislation. The Interstate Commerce Act is remedial legislation and must be liberally construed in order to effect its evident purpose. It is well-settled that exceptions from its reach are to be strictly construed.[1] In *McDonald* v. *Thompson*, 305 U.S. at p. 266, this Court made clear that exceptions to Part II of the Act are not to be broadened by interpretation:

> ". . . As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be

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[1] *McDonald* v. *Thompson*, 305 U.S. 263 (1939); *Piedmont & N. R. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299 (1932); *Interstate Commerce Commission* v. *Teeter*, 228 F. Supp. 479 (D. Ga. 1964); *Interstate Commerce Commission* v. *Interstate Auto Shippers, Inc.*, 214 F. Supp. 473 (S.D. N.Y. 1963); *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163 (10th Cir. 1960); *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (10th Cir. 1958); *United States* v. *LaTuff Transfer Service*, 95 F. Supp. 375 (D. Minn. 1950); *Interstate Commerce Commission* v. *Weldon*, 90 F. Supp. 873 (D. Tenn. 1950) aff'd 188 F. 2d 367, cert. den. 342 U.S. 827; *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn. 1948).

> read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms . . . ."

The decision of the Commission here is contrary to this well-established rule since it seeks to vastly broaden an exemption from the regulatory control contemplated in the statute.

3. In its decision, the Commission briefly discussed a number of prior decisions dealing with the transportation of school children in an attempt to show that its construction here does not conflict with established precedent. It concluded that these prior decisions were either distinguishable on their facts, did not specifically consider Section 203(b)(1), or did not clearly indicate a prior holding that operations such as are here proposed were beyond the scope of the "school-bus exemption".

The failure of prior decisions to discuss Section 203 (b)(1) when the operations involved were not limited to transportation to and from school buildings does not distinguish those cases, but rather demonstrates that, until the decision here assailed, the meaning of the partial exemption was clearly understood as relating only to routine, daily transportation of children and their teachers between their homes and their regular schools.

In the most nearly contemporaneous consideration we can find of the nature of operations within the scope of Section 203(b)(1), no such broad exemption as found here was contemplated. In *Motor Carrier Safety Regulations — Exemptions,* 10 M.C.C. 533 (1938), the Commission considered the matter of necessary safety regulations to be applied to operations

under the various partial exemptions in Section 203 (b), including the "school-bus exemption". In describing the operations covered by this exemption, the Commission said:

> "Section 203(b)(1) exempts from the general provisions of the act 'motor vehicles employed solely in transporting school children and teachers to and from school'. No representatives of carriers engaged in this form of transportation appeared and testified at the hearings. Well-informed witnesses stated that, in their opinion, but few, if any, common and contract carriers were engaged solely in transporting school children and teachers to and from school in interstate commerce. It is obvious that each State provides schools for the children living within its borders and therefore transportation of school children and teachers in interstate commerce to and from school does not occur frequently.
>
> "It seems entirely clear, however, that if there be common or contract carriers engaged in such transportation in interstate commerce, they should be subjected to the strictest type of safety regulations." (10 M.C.C. at 536-37)[2]

It is clear that the Commission had to consider the entire scope of the partial exemption to determine what type of safety regulations should be applied. It is equally clear that the exemption, in the view of both the Commission and its well-informed witnesses, only embraced transportation of school children and teachers to and from the school buildings in routine daily op-

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[2] That there are such operations, even though limited, is shown in *Hinckley Common Carrier Application*, 14 M.C.C. 757 (1939), in which the exemption was found to cover the transportation of school children to a school across a State line.

erations. This is borne out by the statement that each State provides schools for children living within its borders and the conclusion that "therefore," in the language of the exemption, "transportation of school children and teachers in interstate commerce to and from school does not occur frequently." Had school-sponsored educational trips away from the physical school plant been viewed as being embraced within the partial exemption, that fact would certainly have been noted since it may well have called for a different, special type of safety regulation. And the failure of carriers engaged in operations under the partial exemption to participate in the hearing indicates no extensive operations in interstate commerce such as would have been conducted had the Commission's present broad view of the exemption then been held.

The other decision which specifically discusses the Section 203(b)(1) exemption is *Sam Van Galder Common Carrier Application,* Docket No. MC-112422, decided November 6, 1951, 53 M.C.C. 816 (not printed in full).[3] The Commission noted that the applicant had made his interstate charter operations conform to an informal agency opinion that:

> ". . . . unless the trips made by the students are actually considered to be part of the school curriculum and arranged for as such by school officials, and not by the students themselves or by teachers acting in their behalf, they do not come within the partial exemption mentioned." (Appendix E, p. 16a)

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[3] As the decision is not printed in full in the Commission reports, for the convenience of the Court and the parties, a copy is attached as Appendix E.

Yet, when the Commission came to pass upon the lawfulness of the operations, it held:

> "As seen, applicant has functioned as a school bus operator in Rock County for the past five years, and, as an incident thereto, his service has been chartered for trips to Illinois by certain schools, among others. *He continues to transport school groups in interstate commerce in the belief that he may do so under the partial exemption provided by section 203(b)(1). That section is inapplicable to the described interstate operations,* and applicant should immediately discontinue his interstate charter operations." (Appendix E, p. 22a. Emphasis supplied.)

The service proposed in the *Sam Van Galder* case was virtually indistinguishable from that proposed by Keller in the case at bar. And there the Commission concluded that such operations did not come within the exemption.

Other past decisions support the conclusion that prior to the decision here in issue, the Commission has viewed Section 203(b)(1) as embracing only transportation of school children and teachers to and from school, and as not including school-sponsored charter service such as is here involved. In several instances, the Commission has granted operating authority for operations strikingly similar to those now found exempt. *Perry Common Carrier Application,* 12 M.C.C. 281 (1938); *Country Day School Ass'n of Wichita Contr. Car. Applic.,* 13 M.C.C. 201 (1938); *Georgia Caravan Camps, Inc., Contr. Car. Application,* 23 M.C.C. 477 (1940) (authority found necessary but denied on grounds of fitness); *Kickert Common Carrier Application,* 51 M.C.C. 1 (1949); *Weisse and Enders Common Carrier Application,* 63 M.C.C. 215 (1955).

In all of these decisions, except *Perry,* the educational aspect of the trips was spelled out in the records. Lectures were given and teachers explained the points of interest "in a way that will be most beneficial to the children in their school work the following session" (*Country Day School,* 13 M.C.C. at 202); the students were to be "taught history and geography at points of interest" (*Georgia Caravan*); the transportation was on "field trips to agricultural, industrial, and historical sites," of Chorale societies, and of athletic teams (*Kickert,* 51 M.C.C. at 2-3); the transportation was of athletic teams, or "special trips to points of historical and educational interest" (*Weisse and Enders,* 63 M.C.C. at 261).

Nevertheless, in all of those cases, the Commission found that operating authority was required for the proposed service. While the Commission sought to distinguish these prior decisions on various grounds, it concluded that to the extent, if any, they may be construed as inconsistent with the results in the case at bar, they are overruled. 94 M.C.C. 243. Manifestly, the Commission, in the decision below, has departed from this line of prior decisions and has substantially enlarged the partial exemption provided by Section 203(b)(1). It has done this without any justification from the statutory language and admittedly without aid from the legislative history. The only explanation given in the decision is the Commission's own view of the broadened scope of education today, and its view that the economically unregulated services of school-bus operators *should* be available for trips to places of historical and cultural importance in competition with or, undoubtedly, to the exclusion of the authorized and fully-regulated common and contract carriers of passengers by motor vehicle.

The extent to which the Commission's decision has broadened the "school-bus exemption" can readily be demonstrated. Section 203(b)(1) plainly embraces the day-to-day regular transportation of school children and teachers between their homes and their particular schools. No member of the regulated bus industry, and certainly not these appellants, would quarrel with the performance of such transportation by school-bus operators without Commission-granted operating authority. However, the regular common carriers of passengers by motor vehicle are authorized by Section 208(c) of the Act, 49 U.S.C. § 308(c), under rules prescribed by the Commission, to perform transportation of passengers in charter service to points of historical and cultural importance. By its decision here the Commission has introduced new competition by countless school-bus operators without any finding of need for such service and without any control over the rates and charges to be assessed by these school-bus operators.

Nor has the Commission placed any clearly defined limits upon these new operations except that they be of school children and teachers. In light of the Commission's broad view of schooling today, "school related activities" may embrace activities only remotely connected with conventional classroom study. Likewise, "sponsored and supervised by school authorities" is imprecise and can only lead to confusion and controversy. Is it limited to activities so designated by the school board, by the school principal, or by individual teachers? Does it include activities of athletic teams with faculty coaches, clubs with faculty advisors, school "proms" or other social affairs with faculty chaperones? And of the utmost importance, does it

include sightseeing trips over extended distances and periods of time? It should be noted that the Commission construction is much broader than that of the Division which would have limited the exemption to transportation that "is directly connected with and contributes to the educational development of school children," and that is, additionally, "sponsored and paid for by the school as official school functions." 83 M.C.C. 340 None of these even limited controls were adopted by the Commission.

4. When an agency makes such a radical departure from precedent and substantially modifies clear and unambiguous statutory language, the District Court, in affirming the agency decision, is obligated to spell out the basis for its conclusion. Yet in its terse two-page order the District Court gave no explanation whatever of why it concluded such a new and greatly expanded interpretation of the exemption is warranted. In dismissing appellants' action, it merely adopted the findings and conclusions of the Commission and "the applicable findings of fact and conclusions of law" it reached in 212 F. Supp. 659 in a similarly captioned case. This latter is particularly puzzling since the Court, in 212 F. Supp. 659, did not reach the merits but determined only that appellants should have their day before the Commission. The order of the District Court does not constitute the adequate review of the Commission's action to which appellants are entitled.

CONCLUSION

The questions presented by this appeal are of substantial public importance and warrant plenary consideration by this Court upon briefs and oral argument. For the reasons stated, it is urged that jurisdic-

tion be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 64 C 536

NATIONAL BUS TRAFFIC ASSOCIATION, INC., GREYHOUND LINES, INC., TRANSCONTINENTAL BUS SYSTEM, INC., BLUEBIRD COACH LINES, INC., and DELUXE TRAILWAYS, INC., *Plaintiffs,*

v.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, *Defendants.*

Order

Upon consideration of the pleadings, briefs and oral argument the court hereby adopts as part of its findings of fact and conclusions of law the findings and conclusions made by the Interstate Commerce Commission related to the instant case, and further, as additional findings and conclusions the court adopts the applicable findings of fact and conclusions of law of this court reported at 212 F. Supp. 659 in a similarly captioned case.

Accordingly judgment is entered for defendants at plaintiffs' costs and the action is dismissed on the merits.

ENTER:

? ? ? ?
Circuit Judge

? ? ? ?
District Judge

? ? ? ?
District Judge

DATED: June 3, 1965.

APPENDIX B

Served Jan. 13, 1964

M-10961

INTERSTATE COMMERCE COMMISSION

No. MC-119262

ERNEST KELLER, JR., COMMON CARRIER APPLICATION

No. MC-119262

ERNEST KELLER, JR., COMMON CARRIER APPLICATION

Decided December 11, 1963

Upon reconsideration, findings in the prior report, 83 M.C.C. 339, affirmed. Transportation by applicant as a common carrier by motor vehicle, over irregular routes, of schoolchildren and their teachers, in connection with school-sponsored educational trips beginning and ending at points in a described portion of Charles County, Md., and extending to points in the Washington, D. C., commercial zone, found to be within the partial exemption of section 203(b)(1) of the Interstate Commerce Act. Application dismissed.

Appearances as shown in the prior report and, in addition, *Robert C. Bernard, Peter K. Nevitt, Warren A. Goff, Drew L. Carraway,* and *John S. Fessenden* for interveners.

Report of the Commission on Reconsideration

HERRING, *Commissioner:*

In the prior report herein, 83 M.C.C. 339, decided July 29, 1960, division 1 dismissed the application filed November 20, 1959, by Ernest Keller, Jr., of Waldorf, Md., seeking a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common

carrier by motor vehicle, over irregular routes, of passengers and their baggage, in charter operations, beginning and ending at points in Charles County, Md., east of U. S. Highway 301 and extending to points in the Washington, D. C., commercial zone as defined by the Commission. The division found that the service proposed was exempt from the certificate and permit requirements of the Interstate Commerce Act by virtue of section 203(b)(1) thereof which provides:

Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school * * *.

On November 9, 1960, the National Bus Traffic Association, Inc., (NBTA) filed a petition seeking leave to intervene in this proceeding and reconsideration of division 1's decision. We denied this petition on March 3, 1961, and the NBTA and several other interstate motor carriers of passengers[1] sought relief in the Federal District Court for the Northern District of Illinois, Eastern Division. On November 29, 1962, the court, in civil action No. 61-C-944, found that we had abused our discretion in denying the petition of the NBTA, and it directed us to permit plaintiffs to intervene and to reconsider the decision in the prior report. The court did not reach or comment upon the merits of the case. On February 18, 1963, we vacated our order of March 3, 1961, reopened the proceeding for reconsideration, and permitted the plaintiffs in the court action to intervene. The interveners have filed a joint petition for reconsideration.

Applicant owns and operates two 60-passenger buses with which, under contract with the Charles County Board of

[1] The Greyhound Corporation, Transcontinental Bus System, Inc., Bluebird Coach Lines, Inc., and Deluxe Trailways, Inc.

Education, he provides daily transportation for schoolchildren between their homes and schools at or near Hughesville and Waldorf, Md. The application is supported by officials of these schools which would use applicant's service for the transportation of schoolchildren and teachers to Washington. The trips would take place during the school year and would be conducted for educational purposes. Applicant proposes to charter his vehicles to the school board for such trips, and only schoolchildren and teachers traveling as a group would be carried. His service would embrace the pickup and discharge of passengers along the normal schoolbus route as well as at the school building itself.

In their petition interveners contend that the interpretation given to section 203(b)(1) of the act by division 1 does violence to the clear and unequivocal language of the statute; that the prior report constitutes a radical departure from a line of established precedent reflected in a number of earlier Commission decisions; that the division's interpretation of the exemption violates a basic canon of statutory construction which, while it recognizes that remedial legislation ordinarily is to be construed liberally, requires that exemptions from the effect of such legislation be strictly construed; and that if the decision is allowed to stand, schoolbus operators will be enabled to invade the legitimate province of members of the regulated bus industry. Interveners also state that they have no interest in and take no position with respect to the question whether there is a public need for applicant's proposed service.

Section 203(b)(1) exempts from economic regulation any interstate transportation performed in "motor vehicles employed solely in transporting school children and teachers to and from school." An examination of the events surrounding the enactment of this subsection would shed no light upon Congress' reasons for including it in the original scheme of motor carrier regulation. Moreover, the words of the exemption, although at first glance they may appear quite clear, are perhaps not quite so

unequivocal as interveners would have us believe. They seem to take the position that "to or from school" can only mean "between a school building, on the one hand, and, on the other, points located along the normal route of a schoolbus." But when the word "school" is used in the sense of a school building, it is almost invariably accompanied by an article or a descriptive proper name: "a school," "the school," "Central School," or "Public School Number 1." The word "school" in the abstract is much more likely to mean something quite different. Were one to say "School is in session,' for example, he would be referring not to a building but to a body of students and teachers; were he to say "School begins in September," he would mean a period or session of teaching; and should he say "That person never finished school," he would be referring to the process of formal education itself.

Having given further consideration to the section 203(b)(1) exemption, in light of interveners' argument, we remain convinced that division 1 was correct in finding that "It is not clear from the language employed therein that the only transportation contemplated by the Congress was travel to and from classes at the school building." 83 M.C.C. at 340. Even if the word "school" were to be construed in this limited sense, as interveners urge, the type of operation proposed by applicant here could be performed as exempt transportation so long as the school building served as one terminus of any given trip. However, we do not believe that any such artificial routing requirement is necessitated by the statutory language.

As the prior reported noted, schooling today encompasses an area broader than mere classroom instruction. The teaching process is frequently supplemented, for example, with school-sponsored, educational trips to places of historical and cultural importance so that students may obtain firsthand knowledge and experience of what are properly subjects of classroom instruction. To find, as interveners urge, that such transportation is subject to the certificate and permit requirements of the act would be effectively

to preclude its performance by schoolbus operators who are experienced in the day-to-day transportation of the very children involved and who are the natural persons to whom the school authorities would also look to provide service on special occasions. Not only is such a result not dictated by the statutory language, but it would be contrary to the public interest and would create regulatory problems for the schools, the schoolbus operators, and this Commission without really benefiting the certificated passenger carriers. In our opinion, the transportation, in interstate or foreign commerce, of school children and their teachers in connection with school related activities on trips sponsored and supervised by school authorities, falls within the scope of the partial exemption of section 203(b)(1) of the act.

Interveners contend that the prior report herein failed to take into account a number of our earlier decisions dealing with the transportation of schoolchildren. Several of these decisions are easily distinguishable on their facts from the case at hand. *Perry Common Carrier Application,* 12 M.C.C. 281, was an unopposed application in which an examiner's recommended order became effective by operation of law. Applicant, an intrastate schoolbus operator who had also transported "groups of school children, such as athletic teams," in interstate commerce, was granted authority to transport passengers, without restriction to any particular class of persons, in charter operations. A similar case, receiving equally brief treatment, was *Marshall Common Carrier Application,* 21 M.C.C. 363. In neither of these decisions was section 203(b)(1) mentioned. This is also true of *Country Day School Assn. of Witchita Contr. Car. Applic.,* 13 M.C.C. 201. Applicant therein, which operated a semiprivate school, conducted camping trips and tours to points of interest during the summer holidays for its own and other students, at the individual student's expense. The tours were not provided on school time, nor were they part of the general school curriculum. On the contrary, there was active solicitation of prospective travelers, and it is clear

that the tours were operated as a profitmaking venture separate from the school itself. A somewhat similar type of operation, completely unconnected with any school program, was proposed in *Georgia Caravan Camps, Inc., Contr. Car. Application,* 23 M.C.C. 477, in which applicant was found unfit to receive a grant of authority.

Kickert Common Carrier Application, 51 M.C.C. 1, and *Weisse and Enders Common Carrier Application,* 63 M.C.C. 215, are somewhat alike in that in each case a joint board recommended that the applicant be granted common carrier authority to transport passengers, but restricted to the transportation of students and teachers. In neither case was any exception taken to the board's conclusion that there was a need for service of the type proposed, but the recommended orders were stayed by the Commission solely for the purpose of determining whether a grant of authority so restricted was consistent with the obligation of a common carrier to serve the public generally. In both cases it was found that such a restriction would be improper, and in one instance it was removed while in the other contract instead of common carrier authority ws [sic] granted. In neither decision was there any mention of section 203(b)(1), the issue not having been raised. Under these particular circumstances, we do not consider the passing of the question *sub silentio* to be definitive of the scope of the statute.

The only decision cited to us by interveners in which there is a discussion of the section 203(b)(1) exemption is No. MC-112422, *Van Galder Common Carrier Application,* 53 M.C.C. 816 (not printed in full), decided November 6, 1961. Applicant therein was a [sic] choolbus operator in Wisconsin who had also been transporting charter parties, apparently composed only of children, to various points in Illinois. Not all of these trips were sponsored by schools, some having been made on behalf of a local Y.M.C.A. In 1949 he was informed by representatives of our Bureau of Motor Carriers that he could not conduct such operations without authority "unless the trips made by the students

are actually considered to be part of the school curriculum and arranged for as such by school officials, and not by the students themselves or by teachers acting on their behalf." It might be mentioned that the interpretation of section 203(b)(1) which we have adopted herein corresponds closely to that expressed by the Bureau staff in 1949. Division 5 granted the Van Galder application, having found that section 203(b)(1) was inapplicable to applicant's interstate charter operations. It is not clear, however, whether the division considered applicant's transportation of schoolchildren on school sponsored trips, standing alone, as being subject to economic regulation, or whether it was his contemplated transportation of children in connection with other than school sponsored functions (such as Y.M.C.A. trips) that was considered as removing his proposed operations from the scope of the exemption. That decision could not be said to be controlling here as the present applicant does not propose to transport students other than on school sponsored trips. However, to the extent, if any, that the Van Galder decision or any of the aforementioned cases may be construed as being inconsistent with the result reached here, they are overruled.

Upon reconsideration, we find that the proposed operation falls within the partial exemption of section 203(b)(1) of the Interstate Commerce Act; and that the application should be dismissed. An appropriate order will be entered.

COMMISSIONER MURPHY, concurs in the result.

COMMISSIONER FREAS, dissenting:

In my opinion, operations such as those proposed remain subject to the economic regulation of the Commission which has obtained over the years. At this late date there must be cogent reasoning to justify a contrary view and the resulting competitive impact upon interveners. *Cf. Tennessee Products & Chem. Corp.* v. *Louisville & N. R.*, 319 I.C.C. 497, 500, and cases cited therein. Such reasoning is lacking here.

I would grant applicant appropriate authority.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of December A. D. 1963.

No. MC-119262

ERNEST KELLER, JR., COMMON CARRIER APPLICATION

It appearing, That on July 29, 1960, the Commission, division 1, made and filed its report, 83 M.C.C. 339, and order in the above-entitled proceeding, dismissing the application;

It further appearing, That by order entered February 18, 1963, this proceeding was reopened for reconsideration and the National Bus Traffic Association, the Greyhound Corporation, Transcontinental Bus System, Inc., Bluebird Coach Lines, Inc., and Deluxe Trailways, Inc., were permitted to intervene and participate as parties to this proceeding and to file a petition for reconsideration, and that such a petition has been filed;

And it further appearing, That reconsideration of the matters and things involved in this proceeding has been given, and that the Commission, on the date hereof, has made and filed its report on reconsideration herein, which report and the said report of July 29, 1960, are hereby referred to and made a part hereof:

It is ordered, That the said order of July 29, 1960, be, and it is hereby, vacated and set aside;

And it is further ordered, That the said application be, and it is hereby, dismissed.

By the Commission.

HAROLD D. MCCOY,
Secretary

(SEAL)

APPENDIX C

M-10166

INTERSTATE COMMERCE COMMISSION

No. MC-119262

ERNEST KELLER, JR., COMMON CARRIER APPLICATION

Decided July 29, 1960

1. Operation by applicant as a common carrier by motor vehicle, over irregular routes, of specified passengers and their baggage, in charter operations, beginning and ending at points in a described area of Charles County, Md., and extending to points in the Washington, D. C., commercial zone found to be within the partial exemption of section 203(b)(1) of the Interstate Commerce Act.

2. Application seeking a certificate of public convenience and necessity dismissed.

Moultrie Hitt for applicant.

Chester E. King and *Roy Chew* for protestants.

Report of the Commission

Division 1, Commissioners Murphy, Goff, and Herring

BY DIVISION 1:

No exceptions were filed to the order recommended by the joint board, but it was stayed by us.

By application filed November 20, 1959, as amended, Ernest Keller, Jr., of Waldorf, Md., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of passengers and

their baggage, in charter service, beginning and ending at points in Charles County, Md., east of U.S. Highway 301, and extending to points in the Washington, D. C., commercial zone, as defined by the Commission. Atwood's Transport Lines, Inc., opposes the application.

The joint board recommended that the application be dismissed. As indicated, no exceptions were filed; but the recommended order was stayed to enable us to consider the joint board's construction of section 203(b)(1) of the Interstate Commerce Act.

The evidence adduced and the joint board's recommendation have been considered. We find the joint board's statement of facts to be complete and accurate in all material respects, and we adopt it as our own. Certain facts will be repeated for clarity of discussion.

Applicant presently holds no authority from the Commission, but he has been engaged in intrastate operations in Maryland transporting approximately 813 school children to and from 2 schools at or near Waldorf and Hughsville, Md., respectively, under contract with the Charles County Board of Education. He owns and operates two 60-passenger schoolbuses, maintained in compliance with Maryland safety regulations, which are employed solely in the described contract operation. The two schools are each approximately 25 miles from Washington. The supporting officials at the schools consider that official school-sponsored trips to Washington during the school year, arranged as part of the educational process and paid for by the school, would be extremely desirable for the educational and cultural benefits that would accrue to the students.

Section 203(b)(1) of the act provides that "motor vehicles employed solely in transporting school children and teachers to or from school" are not subject to the act except for safety and hours of service requirements. Applicant here does not intend to serve any members of the general

public other than the school children and teachers he is presently transporting in a local schoolbus operation. His operation as proposed and as presently conducted thus involves "motor vehicles employed solely in transporting school children and teachers" and satisfies the first of the requirements of the exemption. The proposed service consists of educational trips to Washington, involving pick-up and discharge along the normal schoolbus route as well as at the school building. The specific question to be resolved here is whether such educational trips can be found to be transportation "to or from school" within the meaning of section 203(b)(1) and, therefore, partially exempt from regulation, or whether they constitute interstate for-hire operations conducted as a sightseeing tour service subject to regulation. It is not clear from the language employed therein that the only transportation contemplated by the Congress was travel to and from classes at the school building. The word "school," is defined in Webster's New Collegiate Dictionary as "any place or means of learning" as well as an institution primarily devoted to the educational development of children. We interpret "to and from school," as used in the exception, as embracing interstate transportation to or from any place where such transportation is directly connected with and contributes to the educational development of school children. Educational development in this context encompasses a broader area than mere classroom instruction in a school building. The scope of the teaching process has widened since the passage of the legislation in question, and classroom instruction frequently is supplemented with field and sightseeing trips to points of historical and cultural interest, in order to provide the students with a firsthand knowledge of places, events, and techniques being studied in the classroom. When such trips, as the ones here proposed, are sponsored and paid for by the school as official school functions, the transportation provided therefor, by a carrier whose vehicles are employed solely in transporting school children

and teachers, in our opinion, falls within the purview of the exemption contained in section 203(b)(1). We conclude, therefore, that the application should be dismissed.

We find that the proposed operation is within the partial exemption of section 203(b)(1) of the Interstate Commerce Act; that no certificate can be granted therefor; and, consequently, that the application should be dismissed.

An order will be entered dismissing the application.

APPENDIX D

National Transportation Policy [49 U.S.C., preceding § § 1, 301, 901, and 1001.]

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 203(b)(1) [49 U.S.C. § 303(b)(1)]

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; . . ."

APPENDIX E

This report will not be printed in full in the permanent series of Motor Carrier Reports of the Commission.

INTERSTATE COMMERCE COMMISSION

No. MC-112422

SAM VAN GALDER COMMON CARRIER APPLICATION

Submitted May 10, 1951 Decided November 6, 1951

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle of passengers and their baggage, in round-trip charter operations, beginning and ending at points in Rock County, Wis., and extending to points in a described area in Illinois, over irregular routes. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Claude J. Jasper for applicant.

John T. Porter for protestant.

Adolph J. Bieberstein for intervener in opposition to the application.

Report of the Commission
Division 5. Commissioners Lee, Rogers, and Cross

BY DIVISION 5:

Exceptions were filed by protestant and intervener to the order recommended by the joint board and applicant replied. Our conclusions differ slightly from those recommended.

By application filed, October 13, 1950, Sam Van Galder, of Janesville, Wis., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of passengers and their baggage, in charter operations, between points in Rock County, Wis., on the one hand, and on the other, Dubuque, Iowa, and points in Illinois on and north of U. S. Highway 30, over irregular routes. Northland Greyhound Lines, Inc., and Cardinal Lines, Inc., motor common carriers of passengers, hereinafter called Greyhound and Cardinal, respectively, oppose the application.

The joint board recommended that applicant be authorized to conduct charter operations, between points in Rock County, Wis., on the one hand, and on the other, Chicago, Ill.,[1] and points in Illinois on and north of U. S. Highway 20 and on and east of Illinois Highway 26 (inadvertently described in the report and recommended order of the joint board as U. S. Highway 26). No exceptions were filed by any party to the recommended partial denial of the application and, since the conclusions of the joint board in this respect are amply supported by the record, we adopt such findings as our own and shall confine the discussion herein to the issues raised on exceptions.

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[1] Chicago, Ill., is located on the described segment of U.S. Highway 20 and, accordingly, results in an unintentional recommended grant of duplicate authority.

Applicant has been engaged for the past five years in operating a school bus in Rock County, transporting elementary and high school pupils, many of whom reside in rural areas, to and from various public schools in the county. As an incident to his regular operations, he has also engaged in intrastate charter operations in Wisconsin transporting student or other youth groups, such as the Boy Scouts, Girl Scouts, and 4-H Clubs, to various points of educational or recreational interest. In addition, his equipment has been chartered by student groups for trips to Chicago, Rockford, and other points in Illinois. Applicant believed that he could lawfully conduct such operations under the partial exception provided by section 203(b)(1) of the Interstate Commerce Act. He has partially curtailed these activities, however, since the summer of 1949, when he allegedly was informed by a representative of our Bureau of Motor Carriers that unless the trips made by the students are actually considered to be part of the school curriculum and arranged for as such by school officials, and not by the students themselves or by teachers acting in their behalf, they do not come within the partial exemption mentioned. Since that time, applicant has made his interstate charter operations conform to the type which the Bureau representative allegedly considered to come within the partial exemption. On at least two occasions, however, he has "leased" his equipment to groups other than those last described. Apparently because applicant's counsel was in doubt concerning the lawfulness of applicant's past operations, including the transportation of school groups, the instant application was filed. Applicant is agreeable to a restriction in any authority granted, limiting his service to the transportation of school-age children and the teachers or other adults accompanying them on charter trips.

Applicant employs two drivers besides himself and operates four school buses, seating 48, 48, 42 and 27 students, respectively, of which one standby unit is used for

charter purposes. He does not contemplate acquiring additional equipment if the requested authority is granted, but if two or more of his vehicles should be chartered at the same time, he plans to hire taxicabs and substitute them for those vehicles withdrawn from regular service. At the time of the hearing his assets totalled $18,800 and his liabilities, $800.00.

Four public school representatives from Rock County and a representative of the Young Men's Christian Association, hereinafter called Y. M. C. A., at Beloit, appeared in support of the application. A junior high school at Beloit, Wis., a point about 13 miles south of Janesville and 18 miles north of Rockford, charters the equipment of applicant on short trips into Illinois and that of Cardinal on trips involving distances of more than 50 miles. Two advantages instanced by the representative of the Junior High school in utilizing applicant's service as opposed to Cardinal's are: (1) the familiarity of applicant and his drivers with the procedures which should be followed by the teacher selected to accompany the students on bus trips, so that an inexperienced teacher can be selected for that purpose in full confidence that the operator of the bus is available for guidance or advice, and (2) the fact that a bus can be chartered from applicant on virtually an hour's notice. In the latter connection, it is the practice of witness to make arrangements in the morning with athletic officials at schools at Rockton, Ill., or Rockford, for informal scrimmages between their respective teams, to take place on the afternoon of the same day, and then to contact applicant at Janesville and arrange to charter a bus to take the team to the particular scrimmage point. He has chartered equipment from applicant for this purpose twice in the past year, and he represents that occasions of this type, requiring equipment to be made available on very short notice, arise from one to six times a year. Although he concedes that the service of Cardinal has also been satisfactory, two

occasions are cited on which the equipment of Cardinal did not arrive at the hour requested. One was a simple delay in making a pickup, but on the other, a Cardinal bus chartered to transport the junior High School football team to Janesville was also chartered by the cross country team of the high school at Janesville and, although Cardinal had been informed that the football game would be over at 5 PM, the bus did not return to Janesville to take the football team back to Beloit until 5:45 PM, with the result that the boys were kept waiting 45 minutes on a cold, windy day. Witness regarded the instance as "a very unhealthy condition so far as the boys are concerned, after they have engaged in a strenuous game".

A school superintendent in charge of 113 rural schools and 12 State grade schools in Rock County recommends the bus service to be chartered by these schools when student groups, accompanied by a teacher, are taken to Chicago to visit certain points of interest. Applicant's equipment has been chartered for 40 to 50 such trips in the past two years, with excellent results. The superintendent supports the application because of applicant's past satisfactory service, both as to his school bus and charter operations, and in order to obtain the service of a carrier whose drivers are personally acquainted with the children and capable of exercising the same degree of discipline over them as that exercised when transporting them to and from the classroom. He has no personal knowledge of whether the drivers of Cardinal and Greyhound meet these qualifications, having never had occasion to recommend the use of their services.

A junior and senior high school at Janesville has utilizer [sic] applicant's service in connection with the transportation of students to Chicago for the purpose of visiting the International Livestock Show, museums, and other points of educational or recreational interest. These trips are supervised by the teachers and paid for out of

moneys contributed by the students. The trips are considered an integral part of the school's educational program, and the principal believes that the curriculum of the school would be detrimentally affected if applicant's low-cost transportation were not available therefor. Greyhound's service has not been utilized because Greyhound does not station equipment at Janesville and the school would have to pay the deadhead mileage involved in dispatching a vehicle from any other equipment-availability point. But extensive use has been made of the charter service of Cardinal, the principal office and main terminal of which are at Janesville, especially for trips by athletic teams to sports events at points considerably removed from Janesville and on which more comfortable riding facilities are desired. Witness is of the opinion that existing motor facilities would not be adversely affected by a grant of the requested authority, since the service of Greyhound has not been utilized and the traffic normally handled by Cardinal will not be diverted to applicant.

Another school official from Janesville adduced testimony which substantially corroborates that given by the previous witness.

The boy's program director of the Y.M.C.A. at Beloit, who has only occupied that position since September 1950, has no immediate need for the proposed service but plans to institute a program of education or recreational trips to Chicago on Saturdays and during the summer months as a continuation of a similar program carried on by the public schools that would require the use of charter service. He has never chartered applicant's vehicles, but his predecessor engaged applicant's service for such trips until the latter was informed that applicant required authority therefor. Since that time the equipment of applicant has only been chartered for trips to points in Wisconsin. The program director will also need charter

service during the summer months for trips to and from a summer day-camp for boys in Illinois, situated about six miles from Beloit, which the boys will attend during the day, returning to their homes at night. About a month prior to the hearing herein, before he knew of the pendency of the instant application, the director contacted the bus depot at Beloit, which is jointly maintained by Cardinal and Greyhound, for information concerning the rates that would be charged for service to and from the day-camp, but thus far, no response to this query has been received.

Greyhound is authorized to operate over regular routes between Madison and Chicago, via Beloit, as well as over several regular routes in Rock County, and as an incident thereto, under the provisions of section 208(c) of the Act, it is permitted to transport charter parties to any point in the United States and return. It has three or four 37-passenger busses available for charter service at Rockford, a point 18 miles south of Beloit, and 20 to 25 busses available for such service at Madison, a point 40 miles north of Janesville. It renders charter service and recently engaged in a charter movement for the high school at Beloit involving the use of seven vehicles. It is seeking additional charter business.

Cardinal operates over a network of regular routes in Wisconsin and northern Illinois, serving, among other points, Janesville, Beloit, Rockton, and Chicago, and as an incident thereto it likewise may transport charter parties to any point in the United States and return. It has four busses available for charter service at Janesville and two at Kenosha, a point about 50 miles east of Janesville. If a driver and a vehicle are available (chartered vehicles are generally driven by supervisory personnel) it is able to dispatch a vehicle from Janesville to Beloit in 30 minutes and it has given charter service on 2 hours' notice; but it prefers service arrangements to

be made at least 24 hours in advance. Its equipment is frequently chartered by school groups for educational or recreational purposes, and its drivers are instructed not to interfere with the authority exercised by the teacher or other person in charge of such groups unless for conduct imperiling the safety of the group and the safe operation of the bus. Cardinal admits that on two or three occasions complaints have been received from Beloit concerning the failure of its busses to arrive at the hour designated, a fact attributed to the neglect of its agent at Beloit to notify its terminal at Janesville of last-minute changes that have been made in designated departure times; but it claims this situation has since been remedied by furnishing each party requesting charter service with a self-addressed postcard to be filled in with the place, date, and hour on which charter service is desired and mailed two days in advance of such date. It actively solicits charter business throughout Rock County, and believes that a grant of the requested authority would have a seriously detrimental effect upon its operations.

In its exceptions, Greyhound contends that the evidence does not support the recommended finding of the joint board, especially insofar as charter operations are authorized to and from Chicago, claiming that no deficiency in the services of existing carriers is shown of record. It concedes, however, that the evidence does establish a need for the proposed services between Beloit and points within a radius of 25 miles of Beloit, to permit applicant to furnish transportation to boys attending a day camp in Illinois near Beloit and for athletic trips to various scrimmage points in Illinois. Cardinal, in its exceptions, urges that the application be denied in its entirety, contending (1) that the opposing carriers are authorized and equipped to meet the transportation requirements of the supporting public witnesses, (2) that the testimony of such witness shows merely a preference for the proposed service based upon a desire either to obtain a rate ad-

vantage or to utilize a carrier whose drivers are familiar with school children and disciplinary procedures, and fails to show any material failures in service by opposing carriers, and (3) that applicant's unauthorized charter operations to points in Illinois are prejudicial to a finding of his fitness to conduct those proposed here. In reply, applicant argues that a grant of the authority recommended is required by public convenience and necessity, and will not adversely affect the operations of the opposing motor carriers.

With these contentions we do not agree. As seen, applicant has functioned as a school bus operator in Rock County for the past five years, and, as an incident thereto, his service has been chartered for trips to Illinois by certain schools, among others. He continues to transport school groups in interstate commerce in the belief that he may do so under the partial exemption provided by section 203(b)(1). That section is inapplicable to the described interstate operations, and applicant should immediately discontinue his interstate charter operations. Applicant's violations of the act have not been intentional or wilful and in such circumstances will not bar a grant of authority in this proceeding.

In our opinion, the evidence as a whole supports the joint board's recommended grant of authority, with the elimination of the duplicate authority mentioned above. Applicant's service has afforded and will afford groups supporting the application a more personalized service and one more easily adapted to their needs. In this connection, although applicant is agreeable to the imposition of a restriction that would confine the proposed service to the transportation of groups of school-age children, such a limitation would be repugnant to applicant's duty as a common carrier. It does not appear that a grant of authority to the extent shown in our findings herein will adversely affect in any material respect, the operations of

other carriers. The description of the boundaries of the area granted in Illinois has been changed slightly from that recommended by the joint board, to make more clear and certain the authority granted.

Applicant is fit and able, financially and otherwise, to conduct the operations hereinafter authorized.

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle of passengers and their baggage, in round-trip charter operations beginning and ending at points in Rock County, Wis., and extending to points in Illinois on and north of a line commencing at Chicago, Ill., and extending over U. S. Highway 20 through Elgin, Starks, Marengo, Belvedere, and Rockford, Ill., to Freeport, Ill., and on and east of a line commencing at Freeport and extending over Illinois Highway 26 through Cedarville and Orangeville to the Illinois-Wisconsin State line, over irregular routes; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that an appropriate certificate authorizing such operation should be granted; and that in all other respects the application should be denied.

Upon compliance by applicant with the requirements of sections 215 and 217 of the act and with our rules and regulations thereunder, an appropriate certificate will be issued. An appropriate order will be entered denying the application except to the extent granted herein.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C. on the 6th day of November A. D. 1951.

No. MC-112422

SAM VAN GALDER COMMON CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied.

By the Commission, division 5.

[SEAL]

W. P. BARTEL,
Secretary.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 635

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a three-judge district court's judgment dismissing appellants' complaint. The complaint sought to enjoin and set aside the Commission's order in *Ernest Keller, Jr., Common Carrier Application,* 94 M.C.C. 238 (J.S. App. B).

795-330—65

Keller, who "owns and operates two 60-passenger buses with which, under contract with the Charles County Board of Education, he provides daily transportation for schoolchildren between their homes and schools at or near Hughesville and Waldorf, Md." (J.S. 3a–4a), requested the Interstate Commerce Commission to grant him authority to charter his vehicles to the Board of Education for trips during the school year to Washington, D.C., for educational purposes, the vehicles to carry only school children and teachers travelling as a group, although they would pick up and discharge the children "along the normal school-bus route as well as at the school building itself" (J.S. 4a). The entire Commission, affirming Division 1 (J.S. 2a, 10a), held that no certificate of public convenience and necessity was required for this use of Keller's school buses because the described operation was within the exemption of Section 203(b)(1) of the Interstate Commerce Act (49 U.S.C. § 303(b)(1)), which provides that schoolbus operators "employed solely in transporting school children and teachers to or from school" need not obtain certificates of public convenience and necessity or file tariffs.[1]

The Commission (J.S. 5a) rejected the contention that the exemption is limited to transportation between the school *building* and points located along the normal route of the school bus, noting that when the word "school" refers to a building it is generally preceded by an article or descriptive adjective and

[1] The section also provides, however, that the Commission shall have full authority to regulate the safety of such operations, as in the case of certificated operations.

that when it appears without such an adjective it is more likely to mean something different, *e.g.*, a body of students, a period or session of teaching, or the process of formal education itself. The Commission pointed out that if the narrow construction of the term "school" was adopted, Keller's proposed operations would still be exempt if he picked the children up and returned them to the school building, for the statute requires only that the transportation be "to or from school." The Commission declined to adopt a construction that would require such artificial routing and would preclude the applicant from picking up and delivering children along the normal schoolbus route. Observing that "schooling today encompasses an area broader than mere classroom instruction," and that "school-sponsored, educational trips" frequently provide "firsthand knowledge and experience of what are properly subjects of classroom instruction" (J.S. 5a), the Commission pointed out that to read "school" narrowly would bar schoolbus operators, "who are experienced in the day-to-day transportation of the very children involved" (J.S. 5a), from carrying on a service that the school authorities would naturally look to them to provide.

In response to the further argument that a broad reading of "school" would be inconsistent with a number of its earlier decisions dealing with the transportation of school children, the Commission noted that most of the prior cases were clearly distinguishable (J.S. 6a–7a) and, indeed, that except in one case, *Van Galder Common Carrier Application*, 53 M.C.C. 816 (J.S. 14a–23a), the issue had not even been dis-

cussed (J.S. 7a). With respect to *Van Galder*, the Commission noted a factual distinctions, and also pointed out that the interpretation of Section 203(b)(1) that it was now adopting corresponded closely to that urged to the applicant in *Van Galder* by its staff in 1949. To the extent that any of the prior cases might be inconsistent with its present ruling, the Commission declared them overruled.

Appellants, bus companies which had intervened before the Commission, brought the present action before a three-judge district court to set aside the Commission's report and order. The court dismissed their complaint *per curiam*, adopting the Commission's findings of fact and conclusions of law (J.S. App. A).

ARGUMENT

The decision of the district court is clearly correct, and plenary consideration by this Court is not warranted. Accordingly, the judgment below should be affirmed.

1. Appellants' basic argument is that the terms of the statutory exemption for school buses carrying children and teachers "to or from school" are so clear that they leave no room for the Commission to construe the provision in accordance with practical good sense and sound administrative judgment and policy. But the Commission's observation that the word "school" can reasonably mean, for example, "a period or session of teaching" (J.S. 5a) seems obviously correct as a matter of common usage. Appellants present no reasoned challenge to this construction (J.S. 10–11). With no legislative history to suggest that Congress intended

the term to be narrowly limited to a particular set of buildings, no reason appears why the Commission's construction should be overturned. Where a local school board has decided that on certain days the formal education of students shall be conducted at sites other than the usual school buildings, it requires no stretching of the language to hold that on such occasions "school" is being held at such places. That is all the Commission here held. The Commission's conclusions that appellants' construction (1) would effectively deprive school authorities of the choice of using "schoolbus operators who are experienced in the day-to-day transportation of the very children involved and who are the natural persons to whom the school authorities would also look to provide service on special occasions" (J.S. 5a–6a) and (2) "would create regulatory problems for the schools, the schoolbus operators, and this Commission without really benefiting the certificated passenger carriers" (J.S. 6a) are not challenged by appellants. Reflecting as they do the Commission's practical experience with this subject and its responsibility for the administration and enforcement of the Act, these conclusions are entitled to great weight. *Levinson* v. *Spector Motor Co.*, 330 U.S. 649, 672.

2. Appellants contend that because of prior cases in which Divisions of the Commission assumed, generally without any discussion, that schoolbus operators are subject to the certificate and permit requirements of the Act, the Commission is now precluded from adopting a broader construction of the exemption provision. But it is precisely the Commission's

prior experience with this problem that most cogently justifies its present ruling—in this, the first case in which the entire Commission has considered the problem—that a narrow construction of the exemption is contrary to the public interest. The Commission's practical experience has shown that local school authorities quite properly look to the schoolbus operators, who are experienced in the day-to-day transportation of the school children, to bus the children for special educational trips and that this preference would be frustrated by requiring certificates of public convenience and necessity in such cases. The complexity of certification proceedings would discourage the small schoolbus operator and the small school system from applying, and thereby defeat the preferences of the school authorities.

3. Appellants argue finally that the Commission's ruling could apply to trips "only remotely connected" with the regular curriculum, and to "sightseeing trips over extended distances and periods of time" and various other types of travel (J.S. 18–19). This case presents no such issue; the contemplated trips are expressly and exclusively for educational purposes.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 635

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal From the United States District Court For the Northern District of Illinois, Eastern Division

REPLY TO MOTION TO AFFIRM

NATIONAL BUS TRAFFIC ASSOCIATION, INC.
GREYHOUND LINES, INC.
TRANSCONTINENTAL BUS SYSTEM, INC.
DELUXE TRAILWAYS, INC.

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On Appeal From the United States District Court For the Northern District of Illinois, Eastern Division

---

REPLY TO MOTION TO AFFIRM

In their motion to affirm, Appellees do not deny that the Commission decision substantially broadens the scope of the partial exemption of Section 203(b)(1) of the Interstate Commerce Act, 49 U.S.C. Sec. 303 (b)(1). Rather, the motion to affirm acknowledges that the Commission has adopted "a broader construction of the exemption provision." (p. 5). The only

justification made for this departure from the prior Commission holdings is "the Commission's practical experience with this subject," but Appellees admit that this is the first case in which the entire Commission has considered the problem. (p. 6)

The Commission's decision is not entitled to deference by the courts. The citation of *Levinson* v. *Spector Motor Company,* 330 U.S. 649 (1946), is inapposite for two reasons. First, in *Levinson,* the Commission did not depart from its own prior interpretation of the Act, which it is admittedly doing here. Second, the deference given to agency interpretation in the *Levinson* case was based on the agency's "long record of practical experience with this subject and its responsibility for the administration and enforcement of this law . . . ." (330 U.S. at 672) Here, the Commission did not base its conclusion on a long record of practical experience; indeed, its practical experience in this field had, prior to the instant decision, dictated a contrary conclusion.

The decision of the Commission (former Division 5) in *Van Galder Common Carrier Application,* 53 M.C.C. 816 (1951) (not printed in full, but reproduced in J.S. Appendix E), held that the transportation of school groups in interstate commerce on trips similar to those involved in the instant proceeding did not come within the partial exemption. This is the only Commission decision discussing the partial exemption in any detail, and represents the Commission's "practical experience" with this problem. When an agency does not rest its conclusion on matters within its own special competence, the principle of deference to agency construction is not applicable but the courts may determine what the governing principle is. *Federal Com-*

munications Commission v. *RCA Communications,* 346 U.S. 86, 91 (1963); *Texas Gas Trans. Corp.* v. *Shell Oil Co.,* 363 U.S. 263, 270 (1960); *Hess* v. *Esperdy,* 234 F. Supp. 909, 911 (S.D.N.Y. 1964). Likewise, a new agency interpretation which is antagonistic to a long-continued construction "is entitled to no weight as an administrative determination." *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States,* 209 F. Supp. 35, 41-42 (N.D. Ill. 1962).

In *United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396 (1956), this Court quoted with approval Mr. Justice Cardozo's statement in *Norwegian Nitrogen Prod. Co.* v. *United States,* 288 U.S. 294, 315 (1933), that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." The narrow construction of the school exemption has been followed by the Commission since its first consideration of the partial exemption in 1938 in *Motor Carrier Safety Regulations—Exemptions,* 10 M.C.C. 533. (J.S. 13-14) The Commission's assumption, without any supporting evidence, that "schooling today encompasses an area broader than mere classroom instruction" (J.S. 5a), is not a cogent reason such as *Leslie* and *Norwegian Nitrogen* contemplate. Nor can the Commission's word play with the term "school" (J.S. 4a-5a) make indefinite or doubtful statutory language which is clear on its face.

Appellees' argument on the impact of the Commission's ruling based on the scope of Keller's original application for authority (p. 6) fails to recognize that, unless reversed, the decision will stand as a precedent for future application of the partial exemption. Appellees do not deny that the ruling broadens the

partial exemption to embrace activities only remotely connected with conventional classroom study. (J.S. 18-19) In view of the admitted broadening of the statutory exemption from economic regulation, Appellees should not be heard to argue that no substantial question is involved because Keller was given much more than he bargained for.

The clear admission that the Commission has broadened the school bus exemption (p. 5) demonstrates the substantially of the question involved. The Interstate Commerce Act is remedial legislation and must be liberally construed in order to effect its evident purpose. It is well-settled that exceptions from its reach are to be strictly construed.[1] In *McDonald* v. *Thompson*, 305 U.S. at p. 266, this Court made clear that exceptions to Part II of the Act are not to be broadened by interpretation:

> " . . . As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms . . . ."

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[1] *McDonald* v. *Thompson*, 305 U.S. 263 (1939); *Piedmont & N.R. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299 (1932); *Interstate Commerce Commission* v. *Teeter*, 228 F. Supp. 479 (D. Ga. 1964); *Interstate Commerce Commission* v. *Interstate Auto Shippers, Inc.*, 214 F. Supp. 473 (S.D. N.Y. 1963); *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163 (10th Cir. 1960); *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (10th Cir. 1958); *United States* v. *LaTuff Transfer Service*, 95 F. Supp. 375 (D. Minn. 1950); *Interstate Commerce Commission* v. *Weldon*, 90 F. Supp. 873 (D. Tenn. 1950) aff'd 188 F. 2d 367, cert. den. 342 U.S. 827; *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn. 1948).

The decision of the Commission here is contrary to this well-established rule since it admittedly enlarges an exemption from the regulatory control contemplated in the statute.

Although the interpretation of the exemption was a matter of first impression before the entire Commission and thereby before the three-judge Court, on review the Court did no more than adopt the findings and conclusions of the agency. Where a question of law is involved, a judicial rubber-stamping of agency action is not the adequate review of the administrative process which the courts are intended to afford. Where the agency's rationale is directly assailed, the basis for the judicial approval thereof cannot be ascertained from a bare adoption of the agency's statement.

For the reasons stated, Appellants respectfully request the Court to deny the motion to affirm and give plenary consideration with briefs and oral argument.

Respectfully submitted,

NATIONAL BUS TRAFFIC ASSOCIATION, INC.

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